NO. 20903

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD PAUL WARD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

FILED

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I

JURISDICTIONAL STATEMENT

On October 20, 1965, a four count indictment was returned against the appellant, Richard Paul Ward, and co-defendant Richard Joseph Chirenza, by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2-5]. 1/

The first count charged that on or about September 30, 1965, appellant and co-defendant Chirenza knowingly and unlawfully received, concealed, and facilitated the transportation and concealment of 154 grams of marihuana.

1/ C. T. refers to Clerk's Transcript of appeal.

The second count charged that on the same day appellant and co-defendant Chirenza knowingly and unlawfully transferred the same quantity of marihuana to an undercover assistant of the Federal Bureau of Narcotics without obtaining from him a written order on a form issued for that purpose by the Secretary of Treasury.

The third count charged that on or about September 30, 1965, appellant and co-defendant Chirenza knowingly and unlawfully received, concealed, and facilitated the transportation and concealment of 618 grams of marihuana.

The fourth count charged that on the same day the co-defendant Chirenza knowingly and unlawfully received, concealed, and facilitated the transportation and concealment of 730 grams of marihuana.

Appellant and co-defendant Chirenza were arraigned and entered pleas of not guilty on October 25, 1965 [C. T. 20].

On November 1, 1965, co-defendant Chirenza entered a plea of guilty to Count One of the indictment [R. T. 10]. 2/ The appellant was then tried alone on Counts One, Two and Three of the indictment. The jury was impaneled on November 1, 1965, and the case continued for trial on November 3, 1965 [R. T. 18, 30]. On November 5, 1965, the appellant was found guilty as charged in the indictment [C. T. 19].

On December 16, 1965, the appellant was committed to the

2/ R. T. refers to Reporter's Transcript of the trial.

custody of the Attorney General for a period of six years on each of Counts One and Two of the indictment, sentence on each of the counts to run concurrently. The Court on its own motion acquitted the appellant on Count Three [C. T. 36].

Appellant filed a timely Notice of Appeal on December 22, 1965 [C. T. 38], and on December 27, 1965 the Court filed an Order granting appellant leave to appeal in forma pauperis [C. T. 41].

The offenses occurred in the Southern District of California, Central Division. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, Title 21, United States Code, Section 176(a), and Title 26, United States Code, Section 4742(a). This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, Section 176(a) provides in pertinent part:

> " . . . whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States

contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000."

Title 26, United States Code, Section 4742(a) provides in pertinent part:

"It shall be unlawful for any person, whether or not required to pay a special tax and register under Sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred on a form to be issued in blank for that purpose by the Secretary or his delegate."

III

STATEMENT OF FACTS

On September 30, 1965, Gordon Brucker, an undercover assistant of the Federal Bureau of Narcotics, was under the supervision of Agents of the Federal Bureau of Narcotics participating in the investigation of possible narcotics transactions [R. T. 187]. Brucker called the residence of co-defendant Chirenza and had a conversation with him [R. T. 62; 188]. Agent Paulus of the Federal Bureau of Narcotics then reached Brucker, gave him $60 in marked currency and placed a Kel transmitter unit on his person [R. T. 64, 188].

Brucker then proceeded to drive his 1958 Cadillac convertible to the Spot Market in Compton [R. T. 64, 189]. Upon arriving at the Spot Market, Brucker pulled into the parking lot and parked near a 1956 white Oldsmobile. There were two persons in the vehicle. The driver was the appellant, Ward, and the passenger, co-defendant Chirenza [R. T. 64, 189, 190]. Chirenza then got out of the Oldsmobile driven by appellant and entered Brucker's automobile on the passenger side. Chirenza told Brucker they had the marihuana but indicated that it was stashed away from the market. He directed Brucker to drive out of the parking lot [R. T. 190]. Brucker, at the direction of Chirenza, drove his vehicle about three blocks from the Spot Market where the car was stopped in the middle of the 1800 block on 152nd Street. Appellant followed closely behind in the 1956 white Oldsmobile and parked behind the Cadillac. Two surveillance units of the Federal Bureau of Narcotics parked further down the street [R. T. 65, 190]. Brucker and Chirenza remained in the Cadillac and appellant got out of the Oldsmobile and walked past the passenger side of the Cadillac to a group of trash cans in front of the Cadillac. Appellant moved some papers aside from one of the cans and took out a white round package. He brought the package back to the passenger side of the Cadillac and handed it to Chirenza [R. T. 65, 154, 191]. Chirenza then said here it is and indicated he had brought "five cans". Brucker indicated he wanted to check the marihuana before giving Chirenza the money. At this point appellant, who had been at the passenger side of the Cadillac convertible, went back and got

into the Oldsmobile [R. T. 154, 155; 192-193]. Brucker then checked the five sacks of marihuana that were contained in the white package appellant had brought Chirenza and counted out $50 in currency which he gave to Chirenza. Chirenza got out of the Cadillac, went back and got into the passenger side of the Oldsmobile and appellant drove away [R. T. 193-194].

Brucker then drove away and was followed by Agents Krueger and Paulus. They again searched his car and person and removed the Kel transmitter, the extra $10 advance funds, and package he had obtained from Chirenza [R. T. 66, 194]. The substance in the package was found to be 154 grams of marihuana [R. T. 144].

Agent Paulus then proceeded to the apartment of Chirenza where he met with Agents Sherman and Coonce [R. T. 68]. Agent Paulus went up to the front door of the apartment, knocked on the door and announced he was an agent of the Federal Bureau of Narcotics who was there to arrest Chirenza. Chirenza looked out the window and then proceeded to open the front door [R. T. 69]. When the door was opened appellant was observed to be standing over the coffee table in the front room of the apartment. The coffee table had a large plastic white jar setting on it and appellant was standing over this jar rolling what appeared to be the end of a cigarette [R. T. 70]. The appellant turned and ran into the bathroom where he threw the cigarette into the toilet and flushed the toilet [R. T. 70, 157-158]. The plastic white jar was found to contain approximately 600 grams of marihuana [R. T. 144]. This is the marihuana indicated in Count Three of the indictment.

At this time a search was made of the apartment and the 730 grams of marihuana indicated in Count Four of the indictment was found in the bedroom [R. T. 73].

IV

ERRORS SPECIFIED BY APPELLANT

The appellant has specified the following points on appeal: 3/

1. "That appellant was denied a fair trial in that appellant was denied effective representation by counsel because counsel was denied adequate time for preparation prior to trial."

2. "Appellant was deprived of a fair trial due to the misconduct of deputy United States Attorney Dees and that the most blatant example of said misconduct was when said Deputy United States Attorney attempted to put into evidence an exhibit (marihuana) when he knew said exhibit was not material or relevant or admissible against appellant."

3. "That appellant was, as a matter of law, convicted upon insufficient evidence for either Count One and/or Count Two herein involved."

3/ Appellant's Opening Brief, pp. 4, 9, 10.

V

ARGUMENT

A. THE TRIAL COURT'S DENIAL OF APPELLANT'S MOTION FOR CONTINUANCE WAS NOT AN ABUSE OF DISCRETION AND DID NOT DENY THE APPELLANT OF EFFECTIVE REPRESENTATION BY COUNSEL.

The question of whether a party has had sufficient time for the preparation of his case and whether a continuance should be granted in one within the sound discretion of the Court, the exercise of which in the absence of abuse is not reviewable.

Elkins v. United States, 266 F. 2d 588
(9th Cir. 1959);

Sherman v. United States, 241 F. 2d 329
(9th Cir. 1957);

Hutson v. United States, 238 F. 2d 167
(9th Cir. 1956);

Williams v. United States, 203 F. 2d 85
(9th Cir. 1953).

In this case the Court appointed Lynn R. Eastman as counsel for the appellant on October 25, 1965 [C. T. 20]. The same day the appellant entered a plea of not guilty as to Counts One, Two and Three of the indictment and the case was set for trial on November 1, 1965 [C. T. 20].

On the morning of trial, November 1, 1965, the appellant

appeared with counsel. At this time counsel requested a continuance until " . . . November 15th to November 22nd . . ." [R. T. 4]. As basis for his request counsel pointed out to the Court that:

> "Since last Monday I have spent a considerable matter of time on this file but I am not prepared, I haven't had a chance to visit the scene or make a complete investigation, I haven't had a chance to talk to the witnesses, I don't have the name of the informer . . ." [R. T. 13, lines 20-25].

On the basis of these representations the Court granted a continuance for two days until Wednesday, November 3, 1965 to enable counsel to do further investigation [R. T. 14].

This further extension of time coupled with the previous investigation by counsel was adequate time for the preparation of the case. The record bears out this fact. The Assistant United States Attorney provided counsel with the substance of the arrest report [R. T. 14]. Counsel talked with the appellant and co-defendant Cherinza [R. T. 448]. He visited the Spot Market and the 152nd Street location [R. T. 91]. He called five witnesses for the defense. He effectively objected to the introduction of physical evidence and testimony during the course of the trial [R. T. 62, 73]. He was provided with the name of the informant at the time of trial [R. T. 187]. The remainder of the witnesses were Federal Narcotics Agents whom counsel effectively cross-examined during the course of trial.

The appellee respectfully submits that the District Court's denial of appellant's motion for continuance till November 15th, when coupled with the two day continuance granted, was a proper exercise of discretion resulting in no prejudice to appellant. This being the case the District Court's exercise of its discretion should not be disturbed.

Heay v. Phillips, 201 F. 2d 220 (9th Cir. 1952).

B. THE CONDUCT OF THE UNITED STATES ATTORNEY DURING THE COURSE OF THE TRIAL DID NOT AMOUNT TO MISCONDUCT, AND IN ANY EVENT HIS CONDUCT RESULTED IN NO PREJUDICE TO THE APPELLANT.

It is argued by appellant that there was prejudicial misconduct on the part of the United States Attorney when he attempted to introduce a quantity of marihuana, marked as Government's exhibit number three for identification, into evidence. This exhibit number three is the marihuana mentioned in Count Four of the indictment which names only the co-defendant Chirenza.

The United States Attorney marked the exhibit for identification and inquired of Agent Paulus where he first saw the exhibit [R. T. 73]. No mention was made by anyone before the jury as to the nature of the contents of the exhibit. At this time appellant objected and, in the presence of the jury, pointed out to the Court

that apparently this exhibit is going to pertain to Count Four of the indictment in which Mr. Ward is not named [R. T. 73]. The United States Attorney then argued that because of what appeared to him to be a partnership relation, possession by one could be transmitted to the other [R. T. 73, line 23]. The Court sustained appellant's objection and instructed the jury to disregard the testimony of the witness with respect to exhibit number three [R. T. 74-75]. As a result of this ruling the jury was only aware by the testimony elicited from the witness that a brown paper wrapped package was seized in Mr. Chirenza's bedroom. This testimony they were instructed to disregard.

At the time the United States Attorney sought to introduce the evidence appellant did not make a motion for mistrial. He chose rather to gamble on the verdict, and since it was not favorable to him, he now raises the issue of misconduct. Without a motion for a mistrial an appeal based upon misconduct is waived.

Jenkins v. United States, 251 F. 2d 51
(5th Cir. 1958).

A holding to the same effect may be found in Harris v. United States, 261 F. 2d 897 (9th Cir. 1959), wherein the Court indicated at page 902:

> "In Alberty v. United States, 9th Cir. 1937, 91 F. 2d 461, 463, the assignments of error raised questions as to the propriety of Government counsel's conduct. The Court stated at page 463:
>
> " 'Whatever hesitation counsel may have

regarding a claim of misconduct of a trial judge, there is none in claiming it against the prosecutor. It should be made at once. The Court should be given the opportunity for instant correction and, if the offense be sufficiently hurtful, declare a mistrial. Counsel cannot occupy the instruments of justice, the Court and jury, in an extended trial and, without objection or motion for relief, raise the same questions on appeal. The same view was expressed in Powell v. United States, 9 Cir. 1929, 35 F.2d 941.' "

Also see: Cellino v. United States, 276 F.2d 941 (9th Cir. 1960).

Further, even in the event the Court decides to review the alleged misconduct, an analysis would disclose that this isolated incident of misconduct, if the Court should choose to call it such, was not such as to so prejudice the jury to deny the appellant a fair trial. This is true especially in this case where the exposure to the evidence was so slight and the Court instructed the jury they should disregard the testimony concerning the evidence.

Berger v. United States, 295 U.S. 78 (1934);

Kasper v. United States, 225 F.2d 275 (9th Cir. 1955);

Nye v. Nissen, 168 F.2d 846 (9th Cir. 1948);

United States v. Goodman, 110 F.2d 390 (7th Cir. 1940).

C. AS THE APPELLANT DID NOT MAKE A MOTION FOR JUDGMENT OF ACQUITTAL AT ANY TIME DURING THE COURSE OF THE TRIAL, THE QUESTION OF THE SUFFICIENCY OF THE EVIDENCE IS NOT OPEN ON APPEAL.

Before the appellant can ask this Court to review the judgment of the District Court on the grounds of the sufficiency of the evidence, he must preserve this basis by appropriate motion in the trial Court. Rule 29(a) of the Federal Rules of Criminal Procedure reads in pertinent part as follows:

> " . . . The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . ."

In the instant case no motion for judgment of acquittal was made either at the close of the Government's case or at the close of all the evidence [R. T. 210, 364, 445].

By failing to interpose his motion in the trial court appellant has waived his right to appeal on the sufficiency of the evidence.

Hardwick v. United States, 296 F. 2d 24 (9th Cir. 1961);

Foster v. United States, 318 F. 2d 684 (9th Cir. 1963);

Castro v. United States, 323 F. 2d 683
(9th Cir. 1963);
Dawkin v. United States, 324 F. 2d 521
(9th Cir. 1963).

The Government is not unmindful of Rule 52(b) of the Federal Rules of Criminal Procedure, and such decisions as Bruno v. United States, 259 F. 2d 8 (9th Cir. 1958) and Lucas v. United States, 325 F. 2d 867 (9th Cir. 1963) wherein the Court may review the sufficiency of the evidence in the absence of a motion for acquittal to prevent a palpable miscarriage of justice, but feels that no injustice would here result.

And in any event, the evidence was sufficient to support the verdict. Appellant argues that the Government failed to show that he possessed knowledge that Exhibit one contained marihuana. As the Government cannot look into the mind of appellant it is required to meet this burden of proving the appellant's state of mind by circumstantial evidence. The evidence in this case clearly supports the trier of facts determination that the appellant had this knowledge.

Apellant left Chirenza's apartment and went with him to plant the marihuana in the trash can on 152th Street [R. T. 233]. He then drove with Chirenza to the Spot Market to await the arrival of Brucker [R. T. 64, 187, 190]. He then drove Chirenza's automobile back to the 152nd Street location [R. T. 65, 190]. Immediately he got out of the car and walked past Brucker's automobile to the trash can which contained the marihuana. Chirenza did not direct appellant to the trash can; rather appellant went and

recovered the marihuana without instructions [R. T. 201]. He returned the white package containing the five sacks of marihuana to Brucker's automobile [R. T. 65, 154, 191]. Chirenza then unwrapped the packages in his presence and handed it to Brucker. In appellant's presence, Chirenza said to Brucker, "Here it is. Give me the money and I will split." [R. T. 205]. Appellant then returned to Chirenza's automobile waited for him to enter and then drove the car away [R. T. 193-194].

Viewing this evidence and all inferences which may reasonably be drawn therefrom in the light most favorable to the Government, the evidence was sufficient to support the verdict of guilty.

Noto v. United States, 367 U. S. 290 (1961);

Byrne v. United States, 327 F. 2d 825 (9th Cir. 1964);

Mosco v. United States, 301 F. 2d 180 (9th Cir. 1962);

Bolin v. United States, 303 F. 2d 870 (9th Cir. 1962).

VI

CONCLUSION

For the reason stated above, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Roger A. Browning

ROGER A. BROWNING